STATE OF MICHIGAN

IN THE SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC,

Petitioner-Appellant,

v

TOWNSHIP OF MARION,

Respondent-Appellee.

Supreme Court No. 130698

Court of Appeals No. 262437

Michigan Tax Tribunal No. 307906

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PETITIONER-APPELLANT HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

This case presents the issue whether specially assessed property owners are entitled to a remedy when a township, without notice to the public, substantially alters a public improvement project and reduces the benefit conferred years after special assessments are levied to pay for the project and the time for challenging the assessments has expired. In its Application, Highland demonstrated that the decisions of the Michigan Tax Tribunal ("MTT") and Court of Appeals not only deny such a remedy in this case, they deny that one exists. Those decisions improperly restrict the scope of the MTT's jurisdiction, render unenforceable the statutory process in 1954 PA 188 ("Act 188"), and conflict with decisions of this Court that require as due process: (1) proportionality between the special assessment amount and the benefit it confers; and (2) candor in notices for public improvement projects.

In response, the Township distorts facts and law in an effort to camouflage the real issue presented, but does not deny that the process by which it altered the project plans did not conform to Act 188's requirements or that a special assessment is invalid if not proportional to the benefit it confers or that, if left undisturbed, the lower court opinions deny a remedy for the noncompliance and disproportionality that occurred here.

On the procedural points it does contest, the Township's arguments are refuted by the record, the case law, and the Tax Tribunal Act's plain language. They provide no reason not to reverse peremptorily or grant leave to appeal the Court of Appeals decision.

ARGUMENT IN REPLY

I. COLLATERAL ESTOPPEL DOES NOT BAR THE DOCKET 906 CLAIMS.

In its defense of the collateral estoppel holding, the Township does not recite the elements of collateral estoppel because it would have to acknowledge that two critical elements are lacking: (1) a question of fact essential to the judgment was not actually litigated and determined by a valid and final judgment in the MTT Docket 431 proceedings; and (2) Highland was deprived of a full and fair opportunity to litigate the issue of the effect of the May 13, 2004 resolution ("Resolution"). *See Monat v State Farm Insurance*, 469 Mich 679, 682-83; 677 NW2d 843 (2004).

A. A Question Of Fact Essential To The Judgment Was Not Actually Litigated.

Highland's MTT Docket 906 petition challenged the Resolution's effect on the Act 188 statutory process and the proportionality of Highland's special assessment. Even assuming that these issues could be characterized as questions of fact, they were not actually litigated or necessarily determined in MTT Docket 431. The 431 Decision, issued on March 19, 2004, was based on a January 27, 2004 Proposed Opinion and Judgment and on pleadings filed by the parties before November 2003; the Resolution was adopted May 13, 2004. Michigan law does not allow the application of preclusion principles to claims that arise after judgment in the first action. *See Askew v Ann Arbor Public Schools*, 431 Mich 714, 726; 433 NW2d 800 (1998); *Siira v Employers Mut Liability Ins Co*, 87 Mich App 227, 234; 274 NW2d 26 (1978) ("a judgment cannot be dispositive of a cause of action based on facts which occur subsequent to the entry of that judgment.") Nor does the 431 Decision anywhere indicate that the Resolution, not yet adopted by the Township when the 431 Decision was rendered, was "essential" to

that judgment. *See Monat, supra*. Contrary to the Township's insinuation, the 431 Decision's inability under Michigan law to have litigated or determined the effect of the as yet unadopted Resolution is not affected by the single sentence in the 38-page Decision stating that neither "official nor unofficial changes" to the plans rendered the confirmation or assessment invalid. The 431 Decision's use of the past tense "rendered" clearly refers to "official [or] unofficial changes" that already had occurred.

B. <u>There Was No Valid Final Judgment.</u>

The Township's argument that the 431 Decision was "final" for collateral estoppel purposes even though it was not final for appeal purposes is an exercise in semantics that no Michigan case has adopted. The Township's reliance on 1 Restatement Judgments, 2d, ch. 3, Former Adjudication, § 13, Comment b, p 132, is not availing. The comment acknowledges a point not in dispute here, *i.e.*, "the fact that an order may be reviewable by interlocutory appeal ... does not necessarily mean that the matter resolved in the order should be treated as final for purposes of res judicata." *Id.* Another section of the Restatement, however, suggests that an important consideration for the application of collateral estoppel is whether the conclusion in question was procedurally definite, a key factor being whether "the decision was subject to appeal or was in fact reviewed on appeal." 1 Restatement Judgments, 2d, ch. 3, Former Adjudication, § 13, Comment g, pp 135-136. Highland had no opportunity to appeal the 431 Decision because the Court of Appeals determined, and the Township admitted,[1] that the 431 Decision was not appealable as a matter of right because it remained consolidated with pending MTT Docket 534 and was not a "final" order. Having

[1] *See* Apx. C to High. Lv. App., High. 7/16/04 Br. Opp. Mtn. Sum., Ex. 5, Twp. 4/9/04 Mtn. Dis.

successfully argued that the Docket 431 Decision was not a final order, the Township is estopped from now claiming that it was a final order with preclusive effect. *Pashke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994).

C. Highland Had No Full and Fair Opportunity To Litigate The Docket 906 Issues.

Independent of the other collateral estoppel elements, the doctrine is inapplicable to bar the 906 Petition because Highland never had a full and fair opportunity to litigate the issue of the Resolution's effect, including its conformity with the Act 188 statutory process and the requirement that special assessments be proportionate to the benefit conferred. In *Monat, supra,* 469 Mich at 685, n 2, this Court stated that, in determining whether a party has had a "full and fair" opportunity to litigate an issue, courts should look to the factors set forth in 1 Restatement Judgments, 2d, ch. 3, Former Adjudication, §§ 28-29, including whether:

> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> * * *
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. (Emphasis added).

1 Restatement Judgments, 2d, ch. 3, Former Adjudication, § 28, p 273.

In this case, under the factor identified in subsection (1), Highland was deprived as a matter of law from obtaining review of Docket 431 because the MTT failed to sever Docket 431 from the pending MTT Docket 534.[2] Collateral estoppel should not apply where a trial court's action deprives a litigant of its right to appeal. *See Universal Ideals Corp v Esty*, 68 Or App 276; 681 P2d 1176, 1179 (1984), *rev den* 297 Or 546 (1984) (where court in first action failed to notify the parties timely of the judgment and plaintiff missed deadline for taking an appeal, trial court's collateral estoppel application reversed on basis that it was unfair to preclude plaintiff from litigating the issue because plaintiff did not have an opportunity to appeal).[3]

Restatement § 28 subsections (2)(b) and (5)(a) also militate against preclusion. The Resolution's effect under the special assessment statutory process is a question of law and a new determination is warranted not only to take account of the change in the legal context effected by the Resolution, but also to avoid inequitable administration of the laws and an adverse impact on the public interest. Unless a "new" determination (actually, the first, on the merits) is granted, the MTT and Court of Appeals decisions would leave property owners without remedy when an assessing jurisdiction like the

[2] In the decision, below, the Court of Appeals expressed uncertainty whether the 431 Docket was severed. (Apx. A to High. Lv. App., p. 6.)

[3] The Court of Appeals decision that Highland was premature in appealing the Docket 431 Decision as a matter of right also implicates Restatement § 28 subsection (5)(c) because the Court of Appeals dismissed the 431 appeal at the Township's urging. The Township moved to dismiss the claim of appeal and argued "inasmuch as the claims in consolidated Docket No. 266534 have not been disposed or adjudicated, [the Tribunal's March 19, 2004 Order in Docket 431] is not a 'final judgment' or 'final order' within the meaning of MCR 7.202(7)(a); and thus it is not appealable of right under MCR 7.203(A)(2)" (Apx. C to High. Lv. App., High. 7/16/04 Br. Opp. Mtn. Sum., Ex. 5, Twp. 4/9/04 Mtn. Dis.). That is, as a result of the Township's conduct, Highland did not have an opportunity to obtain a full and fair adjudication in the initial action. 1 Restatement 2d Judgments § 28, subsection (5)(c).

Township presents one improvement project plan to the public and then, after the special assessment to pay for that project has been confirmed and after the time for challenging the special assessment has expired, alters the plan without notice so that the resulting project is different from that presented to the public and that for which the property was assessed. A new determination is further warranted because the issue of the effect of a post-confirmation change on Act 188's process is one of first impression and of significance to the state's jurisprudence. *See Tar Land Villas Owners' Ass'n v Atlantic Beach*, 64 NC App 239; 207 SE2d 181, *rev den* 310 NC 156 (1984) (collateral estoppel inapplicable where dispute involved a legal issue never before addressed by the state's appellate courts and policy supported allowing the court to determine the issue).

Finally, based on the following key undisputed facts, justice and equity demand that collateral estoppel not bar Highland's 906 Petition: (1) before the December 2, 1996 special assessment was confirmed, the design plans on file with the Township clerk and available to the public "included a sanitary sewer main (the "Highland Property Sewer Main") running in an approximately east-west direction from Lucy Road to D-19 (Pickney Road) across the Highland Property"; (2) months after the special assessment was confirmed and the time for challenging the assessment at the MTT had expired, "one or more [Township] officials decided that it was no longer necessary to construct the trunk line across Petitioner's property and caused the trunk line to be stricken from the plans"; (3) "[t]his decision was not discussed at a public meeting, was not approved in the form of a resolution, and was not communicated to the public or [Highland] at that

time"; (4) "the project was completed without the trunk line"; (5) the MTT concluded that "[a]lthough there was no competent evidence introduced at this hearing to prove the precise dollar value added by the proposed improvement, it is somewhat inconsistent [for the Township] to claim that the trunk line would not confer a benefit to the subject, while at the same time claiming that eliminating the trunk line saved the township over $750,000. The proposed trunk line clearly had value, and Petitioner credibly claimed that it would have conferred value upon the subject"; (6) seven years after the special assessment roll was confirmed, the Township passed the Resolution approving the design alterations; and (7) although Highland was specially assessed for one project, a substantially altered project was built.[4] (Apx. E to High. Lv. App., Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order Dkt. 431, pp. 6, 8, 31-32). The MTT and Court of Appeals decisions deprive property owners like Highland of any opportunity to challenge either the non-statutory actions of the taxing authority or the resulting disproportionality of the special assessment to the benefit conferred on the property by the altered public improvement project.

II. THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT THE MTT LACKED JURISDICTION.

In addition to challenging the Township's noncompliance with Act 188, the 906 Petition contested the amount and proportionality of the special assessment in light of the design alterations approved by the Resolution. In *Wikman v City of Novi*, 413 Mich 617, 626; 322 NW2d 103 (1982), this Court held that an action seeking "direct review of

[4] The Township's Response to Highland's Application misleadingly states that the special assessment was for "the availability of sewer *service*." (Twp. Brief, p 17) (emphasis added). But, the statute provides for the construction of – and special assessments for – specific physical improvements, not services. MCL 41.722(1)(a).

the governmental unit's decision concerning a special assessment for a public improvement" is within the MTT's jurisdiction. Likewise, a property owner's challenge to the procedures used by a township in determining and levying a special assessment falls within the MTT's statutory authority under Section 31 of the Tax Tribunal Act, MCL 205.731, because it is an issue "relating to" special assessments as the term "relate" is commonly understood. A challenge to proportionality coupled with a refund request also falls within the MTT's Section 31 jurisdiction because it concerns a "proceeding for a refund." The Docket 906 Petition challenges the Resolution and explicitly requests that the MTT "reduce the special assessment" and "order a refund." (Apx. G to High. Lv. App., High. 6/14/04 Pet. Dkt. 906, p 4.)

The Township asserts that the Resolution does not "relate to" Highland's special assessment because, in the Township's view, the Resolution had no effect on the special assessment amount or the availability of sewer service to the Property. These notions are refuted by the record and the law. The MTT found that "the trunk line clearly had value" and that the township saved over $750,000 by eliminating the trunk line. (Apx. E to High. Lv. App, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order Dkt. 431, p. 31.) That is, eliminating the trunk line created disproportionality between the assessment amount and the benefit conferred. Special assessments are not valid merely because they provide a benefit; special assessments are valid only where there is proportionality between the amount levied and the benefit received. *Dixon Road* v *Novi*, 426 Mich 390, 401-403; 395 NW2d 211 (1986). Highland's challenge to the disproportionality of the assessment caused by the Resolution was well within the MTT's jurisdiction.

III. THE CIRCUIT COURT ORDER IS NOT *RES JUDICATA.*

The Township's "alternative" *res judicata* argument contains no reasoning; it merely asserts that under "well-established principles of *res judicata*," the Livingston County Circuit Court opinion bars the 906 claim. In fact, those principles do not give preclusive effect to the Circuit Court judgment because (1) the Circuit Court decision was not decided on the merits and (2) the matter in the second case was not nor could it have been resolved in the first. The Circuit Court decision was dismissed for lack of subject matter jurisdiction and such a dismissal has no *res judicata* effect. *See* MCR 2.504(B)(3)(a), applicable to MTT cases under MTT administrative rule TTR 111(4) (involuntary dismissal "other than a dismissal for lack of jurisdiction" is on the merits; thus dismissal for lack of jurisdiction is not on the merits); *Laude v Cossins*, 334 Mich 622, 625-626; 55 NW2d 123 (1952) (judgment based on lack of jurisdiction does not preclude later litigation in a court that has jurisdiction); *In re Quinney's Estate*, 287 Mich 329, 338-339; 283 NW 599 (1939) (dismissal for lack of subject matter jurisdiction "is no adjudication of the merits and will not bar another action for the same cause"). Further, the 906 Petition claims that the amount levied on the property was disproportionate in light of the changed design plan—a claim that was not and could not have been made in the Circuit Court because it is within the MTT's exclusive jurisdiction under MCL 205.731. Dismissal of a claim by a court of limited jurisdiction has no *res judicata* effect on claims that are outside that court's jurisdiction. 1 Restatement Judgments 2d, ch. 3, Former Adjudication, § 26(1)(c), pp 233-234.

CONCLUSION

Highland-Howell Development Company, LLC respectfully requests that this Court peremptorily reverse the Court of Appeals Judgment and the MTT orders it affirms or, in the alternative, grant it leave and upon review, reverse the Court of Appeals and MTT decisions.

Respectfully submitted,

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